ARTICLES

ORGANISED CRIMINALITY AND THE CONSTITUTIONAL STATE

SALVATORE ALEO

A general characteristic of all human activities is the tendency towards greater organisation. One may note that this trend is also present in criminal activities. This article tackles this issue, placing special emphasis on specific problems regarding the definition of liability and the techniques of verification and criminal punishment with regard to forms of criminal organisations. A systemic approach is proposed, by means of which a substantial solution could be found to the problem of enforcement. A historical background of the formation of the law concerning the protection of public safety and the security of the state is also given.

The criminal law models underlying the repression of organised criminality have been considered, in the recent history of continental penal codes and juridical culture in general, to be different from general legal and criminal liability principles, for reasons that will be discussed later. Nevertheless, these models have always been considered inadequate and are becoming more and more obsolete as organised crime develops. This has been true above all in the last twenty years, with the so-called emergency legislation that has been enacted.

The main reason for the difference of the categories both of associative crime and political crime from general principles, is to be found in the lack of definition of liability. The ambiguity underlying the notion of *crimina laesae majestatis*, used in the past to describe political crimes, appears to reflect the difficulty involved in defining this category and what is to be protected. The same is true of the

notions of *paix publique* and public order, used to identify what is to be protected from associative crime. The lack of definition can be considered to reflect both the complexity of the subject and the inadequacy – in the face of this complexity – of the regulatory models and the pretensions to definition connected with them and, therefore, of the concept of law as regards efficiency as well as protection. In a multifactorial analysis the formal concept of law reveals structural limits as regards both to the representation of phenomena and the description of institutional responses.

The justification for the hypothesis of associative autonomous crime has mainly been a lowering of the threshold of criminal liability and answerability in comparison with that of other crimes, given the particular danger represented by stable associations with criminal aims. This is the same justification used for incriminatory descriptions of plot and conspiracy, relating to crimes against the state, given the particular importance of what is at risk.

The above justification would appear to be contradicted by reality. In fact, hypotheses of associative crime are, in practice, usually modelled on the connection between a series of crimes and a stable organising body made up of more than one person. What is particular about such hypotheses, like that of the political crime category, seems to be the stable organisational dimension, which permits the scale and type of offence. Reference to the idea of organisation and an analysis of the related fundamental problems make it possible to identify the function of these hypotheses in the legal definition of liability for personal involvement in a stable organisation responsible for complex criminal activity, independently from liability for single crimes. This function can be considered a generalisation of liability in correlation with the activity of the association (the organising body) in general. In this context, the function of lowering the threshold of answerability and criminal liability becomes marginal.

Compared with ordinary criminal law, the function is clearly different. It implies reconstruction of the organisation's activity as a whole and interdiction of this activity as it is being carried out. With regard to this, the fundamental problems of coordinating inquiries and measures for rewarding witnesses turning State's evidence as well as prevention measures, above all those involving property, take on particular significance. These measures, in fact, serve to break down the organisation, working against both the interpersonal

relationships and property of its members. Both these measures have been characteristic in the history of political crimes.

On one hand, these techniques appear to be fundamental in the repression of organised crime. On the other hand, their compatibility with constitutional state criteria is under discussion. Profound reflection is, in effect, called for on the difficulty of reconciling the formal concept of law – and the corresponding institutional model – with the problems posed by the complexity characterising organised crime, as regards both the efficiency of the system and the protection of the citizen.

In the 1786 *Tuscan penal legislation reform*, called for by Grand duke Pietro Leopoldo, the category of political crime was eliminated; in other words, it was no longer super-imposable on common crime types. This solution is considered to be unique in history. Carrara, the most important exponent of the nineteenth century classical school, omitted in his *Programma del corso di diritto criminale* the analysis of the category of political crimes. He considers them – in the chapter actually entitled "Why I do not deal with this class" – not to be governed by the constant and universal principles of reason, which must govern criminal law, but rather to depend on changes in government and on the results of battles for power.

In the United States, the Supreme Court has taken the direction that the notion of liability for taking part in or belonging to an association or organisation is incompatible with the Constitution in that such a notion is lacking in precision and clarity. In the Anglo-Saxon system, the autonomous general hypothesis of 'conspiracy', theoretically justified as having the function of lowering the threshold of liability in case of organised crime involving more than one person as compared with that for attempted crime, in reality has never played this role. It has rather had the function of expanding liability connections with respect to those normally constituting liability for single crimes, as well has increasing liability for such crimes when carried out in an organised context. It has also been used as a bargaining tool to convince accused persons to turn State's evidence in the discretionary criminal proceedings system.

In the history of the codification of autonomous associative crime types, there have been two different tendencies. On one hand, these types were formulated with reference to phenomena of organised crime considered from a historical and social point of view: initially in the Napoleonic code the notion of *association de malfaiteurs*, was

defined with reference to the bandit phenomenon, *chauffeurs* who attacked and robbed people, as an association formed to commit crimes against people and property, as crime against the public peace. This crime type was then identically reproduced in the Sardo-Italian code. On the other hand, there has been a tendency towards generalisation to the point of arriving at the present criminal association, that is an association formed to commit an indeterminate number of crimes of any type. Since the definition of this crime type, there have been important new definitions regarding specific crimes, in our system, also largely outside the penal code.

The Rocco code provided for crime types involving Subversive Associations (art. 270), Anti-national Associations (art. 271), Illegal Associations with an international character (arts. 273 and 274), Political Conspiracy by agreement and in association (arts. 304 and 305), Armed Bands (art. 306) and the aforementioned Criminal Association (art. 416). The contraband association was provided for in the single text of Customs laws of 1896 as a crime of less gravity than criminal association (Zanardelli code, 1889). This was transformed, in the 1940 Customs law, into aggravating circumstance of the crimes carried out, as in the single text of today's Customs laws. In 1933, the notion of association for the clandestine manufacture of alcohol was provided for, this being considered less serious than criminal association. After the fall of fascism, penal provisions with regards Associations with political aims using military organisations, (Art. 18 part 2 of the Constitution), those relating to the reorganisation of the Fascist party, (according to transitory and final provision XII of the Constitution), those regarding Associations for the restoration, with violence, of the monarchy, and the ones concerning fascist and monarchist groups and armed associations were enacted.

The autonomous provision regarding criminal Associations involved in drug crimes dates back to 1975. Today, it comes under the provisions for Associations involved in the illegal trafficking of drugs or psychotropic substances of art.74 of the 1990 single text. Also in 1975 the autonomous provision for racist Associations was introduced, a provision that was integrated and redefined in 1993. In 1979, Associations aiming at terrorism and at the destruction of democracy were added to the penal code, to be redefined in 1982, as Association aiming at terrorism and at the destruction of Constitutional order (art. 270 bis of the penal code). It also introduced

the aggravating circumstance of the crimes committed to further the aims of this kind of association. In 1979 and 1982 measures to reward the turning of State's evidence and disassociation were also introduced.

As far as mafia criminality is concerned, law no. 575 of 1965 extends the applicability of the personal prevention measures provided for by law 1423 of 1956 to individuals suspected of belonging to a mafia association, and thus for the first time introduced this concept into the Italian legal system. There was reference to *camorristi*, relating to the possibility of assignment to a forced domicile in the laws of 1863 and 1866 which provide for special powers to repress brigands and maintain the internal security of the State. In 1982 the autonomous crime of belonging to a mafia Association (art. 416 bis of the penal code) and the discipline of inquiries and property prevention measures were provided for. More recently, the aggravating circumstance of crimes carried out taking advantage of the conditions provided for by article 416 bis of the penal code or to facilitate the activity of the association laid down in the same article was introduced, as were measures to reward and protect witnesses turning State's evidence (1991). They also provided for differentiation of trial disciplines, execution of the sentence and alternative measures and the institution of specific bodies for the carrying out and co-ordinating of inquiries (Antimafia Investigative Department, National and District Antimafia Departments).

In 1990, the discipline of enquiries and property prevention measures was extended to those suspected of belonging to a drug trafficking association and to those individuals provided for by law no. 1423 of 1956 for the application of personal prevention measures (those who for their conduct and life style must be considered to live habitually, even partly, on the proceeds from crime) considering factual elements in relation to the crimes of extortion, abduction for extortion, money laundering, use of illicit money, goods or utilities and contraband. In 1982, in accordance with art.18 of the Constitution regarding secret associations and the dissolving of the association called the P2 lodge, the secret Association autonomous crime type appeared in the law.

The special legislation against terrorist and mafia organised crime has essentially been justified by the exceptional and immediate seriousness of these phenomena and has certainly been influenced by their history and social consequences. With regards to the latter,

the abstractness and generality of the law should be considered. Whilst with regards to the former, the increase in organisation in all human activities and crime in particular should be considered. Gradually the crimes dealt with by the special legislation have become more serious, from both a qualitative and a quantitative point of view, than those dealt with by criminal law. The perception of this unbalanced relationship between the normal and the exceptional obviously leads to considerations of a general, systemic nature.

In effect, there is a general tendency towards special legislation in our juridical system. "The Age of Decodification" (*"età della decodificazione"*) is the title of a well known essay by a scholar of civil law (N. Irti), where decodification refers to the fragmentation of the system outside the code, the proliferation and stratification of laws and the loss of uniformity and coherence in the system. Thus the explanation for the logic of emergency legislation is to be looked for in a wider sphere. The very form of the code – and the law in the classical nineteenth century sense – would appear to be in difficulty.

Considering the legislation regarding work, housing, health and education, it can be seen that there is a general tendency to legislate for concrete problems of social complexity in all the areas that might be involved (civil, administrative, financial and criminal law). These laws are obviously outside the code and often present problems of compatibility both with the dispositions of the code and those of other laws. These laws, moreover, reflect the effort to represent the different and often contradictory interests of all the categories of people who may be involved: workers and employers, those in the private sector and those in the public, tenants and landlords, the sick, the health service, the paramedics and so on.

The law, as represented by the code, is characterized by the provision of a single perpetrator of crime, but this concept would appear to be in crisis. The subjects are relevant from a juridical point of view as social types, because they are bearer of interests. A political reason for this is undoubtedly represented by democracy and the pluralistic nature of society: the multiplicity of bodies representing interests and consequently the interests politically represented, means that laws necessarily constitute compromises. Vice versa, the society in which the modern codification was constructed was characterised by a clear distinction between the government and the governed and by restricted and fairly homogeneous groups of leaders, among whom recognition of essential values (considered

absolute and universal) was more frequent. A cultural reason concerns the crisis in the formalistic concept of law and the awareness of the limits of binary formal logic. Juridical problems are analysed from a sociological point of view or according to context and ever more complex solutions are proposed. This approach can be, and is, considered to belong to a constitutional welfare state. The complexity, therefore, relates to a reconstruction of the phenomena and at the same time the identification of the problems and the type of institutional solution.

Two areas in which the problems mentioned above arise most evidently are those of organisation and globalisation, which can be identified as different but connected aspects of the increasing complexity of human activity, and, therefore, of criminal activity and the relative institutional problems. In the general notion of organisation, the importance of the individual or of a single contribution lies in its functional relationship with the organisation, and it is measurable, therefore, in terms of its usefulness and advantageousness for the activity of the organisation. The relationship is of a stable nature if it involves participation in the criminal association where the organisation factor lies in the fact the contribution can be relied on in advance. There can, however, be a functional relationship with the organised activity when there is external participation in the organised crime. In general, neither causal theory nor causal analysis itself, depending on binary logic, are sufficient to define an organisational model and individual contributions to it, that is contributions to an organised crime model. In the theory of organisation, connections are to be found that are of a functional nature, different from those that are really causal. Descriptions of the corresponding cases of liability concern, on one hand, the general characteristics of the organised, systematic activity carried out and, on the other, the relationship of the individual with the structure and general activity of the organisation.

On one hand, the fundamental problem of the organisation is of a general nature with respect to any type of criminal activity, as is the question of complicity with respect to any type of crime. This explains the tendency to generalise incriminatory provisions in the history of associative crime and in the definition of criminal organisations. On the other hand, the notion of liability for a contribution to the organisational dimension of a crime, like the institutional response to this, cannot but be proportional to the type and nature of the

crime. This explains the tendency to define associative crime and the discipline of repression of organised criminality according to the type of criminal activity.

In effect, the notion of liability for a personal contribution to the organisational dimension of a complex criminal activity concerns a relationship with this activity in general and is therefore generic with respect to the single crimes constituting the activity. It, therefore, presupposes an awareness of the type of criminal activity rather than of the particular crimes. It is in this generality and indefiniteness of the relationship with the criminal activity of the organisation that the specific character of liability for contributions to the organisational dimension of the association is to be found.

The fundamental problem of liability for a contribution to the organisational dimension of criminal activity can be dealt with generally and systematically, with reference to the type of complex criminal activity as distinct from single crimes. This happens in today's language when an association is defined as "oriented" towards the realisation of certain types of crimes. It also happens in the discipline of continuing crimes, in the relationship between the association's crimes as well as that between such crimes and the associative crime hypothesis. In effect, this contradicts the original approach of the code. With this in mind, it is worth remembering that in the American system, where the notion of liability for a relationship of a general nature with a criminal association is not accepted, it has happened that leaders of an organisation have been charged with all the crimes committed by the organisation. This has happened both in the case of criminal organisations and in that of political and union organisations, where leaders have been held responsible for the realisation of illegal actions in the course of a public demonstration.

Once the criterion of liability has been defined, it should be pointed out that the notion of liability for a contribution to an organisation does not seem to be more specifically classifiable in that there is no reference to the function of the contribution. This is undoubtedly in contrast with the need for precision in criminal law. Throughout the history of codification, the need for precision in the definition of liability for complicity in crime has not been satisfied. This has happened for a basic reason: complicity is defined in relation to the conduct of the other persons. Thus, these definitions should be considered to be "without a threshold", indefinite, abstract and

general. Undoubtedly, even a very small contribution can have importance in the realisation of an enormous crime. This fundamental problem highlights one of the essential limits of the law and does not appear to be resolvable in absence of a judicial recourse to value judgements. It can be said, in fact, that in these cases the regulations define requirements and criteria of evaluation better than the models they should follow.

The general and systematic penal approach to organised crime, following general organisation theory, finds justification in the increasing frequency of these phenomena as regards various types of crimes. Moreover, this approach is justified by the international dimension of organised crime and, in fact, corresponds to the need to overcome differences in laws and institutions between the states, by means of reference to the fundamental problem of organisation in every type of crime. In the same way, penal handling of the general problem presented by organisations could make it possible to overcome the traditional specificity of political crime: in fact, social and institutional stability can be put at risk only by organised violent crimes.

The above function of concrete and dynamic restraint of an association's criminal activity and of its organisation in the realisation phase itself undoubtedly seems strange when compared with that of ordinary criminal law. In the classical nineteenth century concept, the juridical function is performed by the form of the law itself, of which the judge is the faithful executor. That is to say the essential function of abstract and general prevention of crime by means of provision for a sentence is confirmed and reinforced by application and execution. The law thus protects the citizen. In the welfare constitutional state, both the form and the function of the law appear to be profoundly changed. The typical positive functions of the welfare state are defined by the law but they are entrusted directly to operators. Therefore one may say that it is not possible to specifically formalise the relative modality. The functions are performed by the operators, according to regulations and criteria established by the law. Thus, legal regulations define the framework and the criteria for the exercising of operational discretion, directly correlated with the function to be realised.

In criminal law, this is evident in the fundamental problem of re-education. The contents and tools of re-education are not classifiable, at least not beyond a certain point, but can be effectively realised by

the operators concerned. Considering the re-educative function that the Constitution gives a judgement, the classical penal concept's objective notion of crime – bound to the nineteenth century vision of free will to be conditioned by a provision for punishment – certainly seems inadequate. In the legal regulation of criminal trials of minors, the radicalisation of re-education considerations, with the loss of intrinsic penal logic, has – from a formal point of view – altered the structure of the classical penal system. In this light, the problem of protection cannot obviously be limited to the formal dimension it had in the nineteenth century concept, because the law – in that it defines the functions to be realised – cannot act as a limit in the classical sense. All things considered, it is necessary to think again about the problem of guarantees from a general institutional or constitutional point of view.

The discipline of preventive measures, with regards both to the person and to assets, can hardly be formalised except as regards procedures. The same can be said for rewards for turning State's evidence. The discipline regarding assets is prevalently administrative, as regards function and contents, and carried out with the guarantees provided by jurisdiction. The techniques of rewarding, for instance trial bargaining, in effect, constitute a contradiction to the principle of obligatory criminal action. In fact, they reflect a logic and a way of operating that has nothing to do with the formal concept of law or with the Montesquieuian model of the State and division of power.

Considerations regarding these aspects of crisis, or alteration in the structure of the classical model of Constitutional State, obviously, lead to the problem of a comparison with systems of an Anglo-Saxon type, in which the law has not had the continental formal code dimension, for reasons that cannot be gone into here.

The above reasons for de-formalisation of the penal system would not seem to be reversible. On the contrary, from all the points of view examined, it would appear likely to increase as increased levels of complexity are perceived. As already said, there remains the problem of providing guarantees in a different way.

The technique of rewarding witnesses turning State's evidence, would appear to be indispensable for the repression of all forms of organised crime – not only terrorist or mafia crimes but also political and institutional corruption. On the other hand, this technique contradicts the foundations of the system and the penal procedure

of the liberal formalist concept. In reality, the witness turning State's evidence could be considered just a source in inquiries and not a source of proof. An essential problem would appear to be that of defining the contents of the declarations, as regards which general organisation theory might become extremely important. In general, moreover, inquiries could again be entrusted to the police, that is taken away from the Public Prosecutor. This solution would, perhaps, make it possible to not alter the present importance of the principle of obligatory penal action.

The problem of comparison of different institutional systems obviously becomes of prime importance in a consideration of the international and supernational dimension of organised crime and institutional responses to it. This dimension can be identified as a further autonomous reason for the alteration in the structure of the nineteenth century juridical system, that is to say de-codification. In every sense, it constitutes an important reason for the crisis in the nineteenth century forms of law and code and the relative institutions. Finally, there is the question of information technology, to be considered as technology favouring both crime and the institutional response to it.

To sum up, considering juridical and penal inquiries and culture in general, it would seem to be essential to increase – through organisation theory – recourse to systemic analysis and functionalistic methodology. Also more consideration must be given to the relationship between cost and gain and a non-formalist vision of the guarantees provided by the law, that is to say to consider the multiplicity of the roles and trial subjects and not just the limits of penal judgement.

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